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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 PATRICK S. CLEWIS and PATRICIA E.  
11 CLEWIS,

12 Plaintiffs,

13 v.

14 BANK OF AMERICA N.A., and BAC  
15 HOME LOANS SERVICING, LP,

16 Defendants.

CASE NO. C11-5077BHS

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS AND DENYING  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

17 This matter comes before the Court on motion to dismiss of Defendant Bank of  
18 America N.A. ("BANA"), for itself and as successor by merger with Defendant BAC  
19 Home Loans Servicing LP ("BAC") (collectively "BANA") (Dkt. 17); and Plaintiffs  
20 Patrick and Patricia Clewis' ("the Clewises") motion for summary judgment (Dkt. 19).  
21 The Court has reviewed the briefs filed in support of and in opposition to the motions and  
22 the remainder of the file and hereby grants the motion to dismiss and denies the motion  
23 for summary judgment for the reasons stated herein.

24 **I. PROCEDURAL HISTORY**

25 On January 27, 2011, the Clewises filed a complaint against BANA alleging  
26 various violations of federal and state laws originating from a mortgage transaction. Dkt.  
27 1 ("Complaint").  
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1 On August 23, 2011, BANA filed a motion to dismiss or, in the alternative, a more  
2 definite statement. Dkt. 17. On September 8, 2011, the Clewises responded and moved  
3 for summary judgment. Dkt. 19. On September 16, 2011, BANA replied to its motion  
4 and responded to the Clewises' motion. Dkt. 20.

## 5 **II. FACTUAL BACKGROUND**

6 On or about February 21, 2008, the Clewises obtained a \$417,000 mortgage loan  
7 ("Loan") to finance the purchase of real property located at 15229 Glacier Vista Lane SE,  
8 Yelm, Washington 98597 (the "Property"). Complaint at 36. The Deed of Trust securing  
9 the Loan to the Property identifies the Clewises as the borrowers, Ward Lending Group,  
10 LLC ("Ward Lending") as the Lender, First America Title Insurance Company as trustee,  
11 and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary. Dkt.  
12 18, Declaration of William K. Rasmussen ("Rasmussen Decl.") Ex. A ("Deed of Trust").  
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14 On October 25, 2010, MERS recorded a Corporation Assignment of Deed of Trust  
15 in Thurston County under Auditor No. 4178440, evidencing the transfer of its beneficial  
16 interest in the Deed of Trust to BAC. Rasmussen Decl. Ex. B ("Corporation Assignment  
17 of Deed of Trust"). BAC then executed an Appointment of Successor Trustee naming  
18 ReconTrust Company, N.A. ("ReconTrust") successor trustee under the Deed of Trust;  
19 the Appointment was recorded in Thurston County under Auditor No. 4178441.  
20 Rasmussen Decl. Ex. C ("Appointment of Successor Trustee").

21 BANA claims that the Clewises have defaulted on payments due pursuant to the  
22 Loan. Dkt. 17 at 3. On November 3, 2010, ReconTrust recorded a Notice of Trustee's  
23 Sale in Thurston County under Auditor No. 4179750, scheduling a sale of the Property  
24 for February 4, 2011. Rasmussen Decl. Ex. D ("Notice of Trustee's Sale"). The notice  
25 references total arrears of \$47,405.84 and ongoing default since September 2009. *Id.* at 2.  
26 A sale of the Property has not taken place, and the Notice of Trustee's Sale recorded in  
27 November 2010 has expired by operation of the Washington Deed of Trust Act ("DTA").  
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1 See RCW 61.24.040(6) (a trustee may “continue the sale for a period or periods not  
2 exceeding a total of one hundred twenty days”).

### 3 **III. DISCUSSION**

#### 4 **A. Motion to Dismiss**

5 BANA moves to dismiss the Clewises’ complaint for failure to state any plausible  
6 cause of action against BANA. Dkt. 17. The Clewises response is limited to an  
7 “objection” to BANA’s motion and a request that the Court give the Clewises “instruction  
8 of how pleadings are deficient and how to repair pleading, and to give [them] an  
9 opportunity to repair pleadings.” Dkt. 19 at 1. The Court has liberally read the Clewises’  
10 complaint and, not being a model of clarity, will address those causes of action that the  
11 Clewises seem to assert.

#### 12 **1. Standard**

13 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a  
14 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
15 theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).  
16 Material allegations are taken as admitted and the complaint is construed in the plaintiff’s  
17 favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked  
18 by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a  
19 plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than  
20 labels and conclusions, and a formulaic recitation of the elements of a cause of action will  
21 not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal  
22 citations omitted). “Factual allegations must be enough to raise a right to relief above the  
23 speculative level, on the assumption that all the allegations in the complaint are true (even  
24 if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to  
25 relief that is plausible on its face.” *Id.* at 1974.  
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1           **2.     DTA**

2           The Clewises assert that the DTA is unconstitutional. Complaint at 5-9. The  
3           Clewises, however, fail to provide a cognizable allegation or argument to support this  
4           assertion. Moreover, the Clewises fail to state what constitution, state or federal, the act  
5           violates or what clause of a particular constitution is violated. The Clewises merely  
6           provide labels and conclusions, which do not state a plausible claim for relief. *Twombly*,  
7           127 S. Ct. at 1964-65. Therefore, the Court grants BANA’s motion on the Clewises’  
8           claim that the DTA is unconstitutional.

9           **3.     False Declaration**

10          The Clewises assert a cause of action titled “False Declaration and Notice of  
11          Default” that concludes with the allegation that the company initiating the foreclosure is  
12          not the holder in due course of the Note. Complaint at 9-10. The Clewises request proof  
13          of an executed “declaration of default/ratification of commencement for the non-judicial  
14          foreclosure of the [Property].” *Id.* at 10.

15          In Washington, the non-judicial foreclosure process merely requires that the  
16          trustee possess proof that the beneficiary is the owner of the obligation secured by the  
17          Deed of Trust. RCW 61.24.030(7)(a). A declaration from the note holder is sufficient.  
18          *Id.*

19          In this case, ReconTrust was appointed as successor trustee and that appointment  
20          was recorded with the Thurston County Auditor. The Clewises have failed to make any  
21          allegation that the trustee does not possess proof that the beneficiary is not the owner of  
22          the obligation secured by the Deed of Trust. Moreover, the Clewises have failed to  
23          provide any authority for a cause of action based on a false declaration. Therefore, the  
24          Court grants BANA’s motion to dismiss this claim because it is not based on a plausible  
25          legal theory.  
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1           **4.     Failure of Consideration**

2           The Clewises assert a cause of action for failure of consideration. Complaint at  
3 10-11. The Clewises allege that BANA failed to pay “consideration to purchase the  
4 [Property] . . . ,” and that when there is no consideration “there is no contract and no sale .  
5 . . . ” *Id.* at 11. Even if there was a failure of consideration as to some undefined contract  
6 that the Clewises reference, the Clewises have failed to show how they have a private  
7 right of action to enforce such a failure of consideration. Therefore, the Court grants  
8 BANA’s motion to dismiss the Clewises’ cause of action for failure of consideration.

9           **5.     Trustee’s Actions Void**

10          The Clewises assert a cause of action titled “Appointment & Acts of Trustee  
11 Void.” Complaint at 11-13. The Clewises assert various allegations that the documents  
12 regarding appointment and assignment of the successor trustee are fraudulent, void, and  
13 invalid. *Id.* The Clewises, however, have failed to provide any allegations beyond mere  
14 labels and conclusions. Therefore, the Court grants BANA’s motion to dismiss this cause  
15 of action.

16          **6.     “Show Me the Note”**

17          The Clewises assert numerous claims based on their demand that BANA provide  
18 “strict” proof of certain documents. Complaint at 13-22. The Court construes these  
19 claims as a variation of the “show me the note” cause of action, which is a claim that  
20 parties have asserted to prevent otherwise valid non-judicial foreclosure actions until  
21 certain documents are produced to the party being foreclosed upon. *See, e.g., Freeston v.*  
22 *Bishop, White & Marshall, P.S.*, 2010 WL 1186276 (W.D. Wash. 2010).<sup>1</sup> The Court has  
23 consistently dismissed these causes of action because they are not based on a plausible  
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27           <sup>1</sup> The Court’s ruling in *Freeston*, 2010 WL 1186276, was affirmed in a Ninth Circuit  
28 memorandum opinion (Case No. 09-5560BHS, Dkts. 91, 93).

1 legal theory. *Id.* (quoting *Diessner v. Mortgage Electronic Registration Systems*, 618 F.  
2 Supp. 2d 1184, 1187 (D. Ariz. 2009) (collecting cases)).

3 In this case, the Clewises have failed to assert a plausible cause of action for any  
4 failure of BANA to produce any particular document or produce proof of the validity of  
5 any particular document before the non-judicial foreclosure may proceed. Therefore, the  
6 Court grants BANA's motion to dismiss these claims.

### 7 **7. Truth in Lending Act**

8 The Clewises have attached to their complaint a "forensic audit" of their loan.  
9 Complaint, Ex. D. The audit states that it is "based exclusively on the documentation  
10 provided." *Id.* at 3. Based on this audit, the Clewises assert a claim for six violations of  
11 the Truth in Lending Act ("TILA"). Complaint at 22-23.

12 Any claim for damages under TILA must be brought within one year of the date of  
13 the violation. 15 U.S.C. § 1640(e); *King v. State of California*, 784 F.2d 910, 916-17 (9th  
14 Cir. 1986). Courts lack subject matter jurisdiction to hear claims brought outside the  
15 limitations period. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir.  
16 2002). The date of the violation is the date a borrower signs loan documents. *Meyer v.*  
17 *Ameriquist Mortgage Co.*, 342 F.3d 899, 902 (9th Cir. 2003).

18 In this case, the Clewises' TILA claim is time barred. The Clewises signed the  
19 loan documents in February of 2008 and filed this complaint in January of 2011, which is  
20 a time period greater than one year. Therefore, the Court grants BANA's motion to  
21 dismiss the Clewises' TILA claim.

### 22 **8. Real Estate Settlement Procedures Act**

23 Based on the forensic audit, the Clewises assert a claim for five violations of the  
24 Real Estate Settlement Procedures Act ("RESPA"). Complaint at 23-24. The Clewises  
25 also allege that BANA has failed to respond to a qualified written request.  
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1 Similar to TILA, the majority of RESPA violations must be brought within one  
2 year. *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 358-60 (5th Cir. 2003); 12  
3 U.S.C. § 2614. However, failure of a loan servicer to respond to a qualified written  
4 request for information relating to the servicing of a loan is subject to a three-year statute  
5 of limitation. 12 U.S.C. §§ 2605 & 2614.

6 In this case, the Clewises' RESPA claims are barred by the statute of limitation  
7 except for the claim that BANA failed to respond to a qualified written request. The  
8 Clewises, however, have failed to allege enough facts to support this particular RESPA  
9 claim. For example, the Clewises fail to allege that they made a proper qualified written  
10 request to BANA. Therefore, the Court grants BANA's motion to dismiss the Clewises'  
11 RESPA claims.

## 12 **9. Predatory Lending**

13 The Clewises assert a cause of action against BANA for predatory lending.  
14 Complaint at 24-25. The Clewises, however, fail to provide any authority that establishes  
15 predatory lending as a separate tort cause of action. Therefore, the Court grants BANA's  
16 motion to dismiss the Clewises' predatory lending claim.

## 17 **10. Civil Rights**

18 The Clewises allege that BANA's predatory lending practices violated the  
19 Clewises' right to due process of law and right to equal protection. These are mere labels  
20 and conclusions that do not state a plausible claim for relief. *Twombly*, 127 S. Ct. at  
21 1964-65. Therefore, the Court grants BANA's motion to dismiss this cause of action.

## 22 **11. Common Law Lien**

23 The Clewises allege that they sustain a common law lien on the Property that  
24 supercedes any mortgage or equity lien. Complaint at 26. The Clewises, however, have  
25 failed to provide any authority that establishes their assertions as a valid cause of action.  
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1 Therefore, the Court grants BANA's motion to dismiss on the Clewises' common law  
2 lien claim because the Clewises have failed to allege a plausible cause of action.

### 3 **12. Fraud**

4 The Clewises allege multiple causes of action for fraud. *See* Complaint at 27-29  
5 (titled "CAUSES OF ACTION"). The Clewises, however, have failed to allege fraud  
6 with particularity. *See* Fed. R. Civ. P. 9. Moreover, the alleged fraud is based on the  
7 allegations in the previous causes of action, such as fraud due to predatory lending  
8 practices. Complaint at 28. The Clewises fail to allege a plausible causes of action for  
9 fraud because the underlying causes of action are not plausible. Therefore, the Court  
10 grants BANA's motion to dismiss the Clewises' causes of action for fraud.

### 11 **B. Motion for Summary Judgment**

12 The Clewises motion for summary judgment fails for numerous reasons. First,  
13 they failed to make their motion in a separate brief. *See* Local Rule 7. Second, they  
14 failed to show that they are entitled to judgment as a matter of law or that there exists no  
15 question of fact as to the claims they have asserted. *See* Fed. R. Civ. P. 56. Therefore,  
16 the Court denies the Clewises' motion for summary judgment.

### 17 **C. Relief**

18 When granting a motion to dismiss, claims that are not based on a proper legal  
19 theory should be dismissed without leave to amend. *Keniston*, 717 F.2d at 1300. The  
20 Court, however, should allow pro se plaintiffs an opportunity to amend claims that fail for  
21 lack of sufficient factual allegations. *Id.*; *see also Lucas v. Dep't of Corr.*, 66 F.3d 245,  
22 248 (9th Cir. 1995) (Unless it is absolutely clear that no amendment can cure the defect, a  
23 pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to  
24 amend prior to dismissal of the action.).

25 In this case, the Court finds that all but one of the Clewises' claims are either not  
26 based on a proper legal theory or cannot be saved by any amendment. The sole exception  
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1 is the Clewises' RESPA violation that is based on the allegation that BANA failed to  
2 respond to a qualified written request. Therefore, the Clewises may file an amended  
3 complaint that sets forth a short and plain statement of allegations that support this cause  
4 of action.

#### 5 **IV. ORDER**

6 Therefore, it is hereby **ORDERED** that BANA's motion to dismiss (Dkt. 17) is  
7 **GRANTED** and the Clewises' motion for summary judgment (Dkt. 19) is **DENIED**. The  
8 Clewises' claims are **DISMISSED with prejudice**, except for the Clewises' claim that  
9 BANA violated RESPA by failing to respond to a qualified written request. The  
10 Clewises may amend their complaint as to this claim only. The amended complaint shall  
11 be filed no later than October 21, 2011. Failure to file the amended complaint may result  
12 in dismissal of this action. The addition of any other claim or cause of action may, if  
13 appropriate, result in the Court striking that portion of the amended complaint.  
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15 DATED this 6th day of October, 2011.

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18 BENJAMIN H. SETTLE  
19 United States District Judge  
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